



BY ADAM COHEN

GOVERNMENT AGENTS CAN sneak onto your property in the middle of the night, put a GPS device on the bottom of your car and keep track of everywhere you go. This doesn't violate your Fourth Amendment rights because, without a gate or no-trespassing sign, you do not have any reasonable expectation of privacy in your own driveway.

That is the bizarre—and scary—rule that now applies in California and eight other Western states. The U.S. Court of Appeals for the Ninth Circuit, which covers this vast jurisdiction, recently decided the government can monitor you in this way virtually anytime it wants, no warrant needed.

GPS devices are proliferating as new uses emerge. People rely on them for

turn-by-turn directions or, with services like OnStar, use them to call for help in an emergency. Some drivers are installing GPS devices in their teens' cars in exchange for lower insurance rates.

But like many technologies, GPS has some worrisome downsides—like loss of privacy. The Ninth Circuit's Aug. 12 ruling ratchets up that concern by giving the government far more leeway to use GPS to spy on people. The issue is likely to end up before the Supreme Court, particularly since another appellate court—the one covering the District of Columbia—ruled on Aug. 6 that GPS tracking for an extended period is an invasion of privacy that requires a warrant.

How could the Ninth Circuit reach such a different conclusion? The case began in 2007, when Drug Enforcement Administration (DEA)

## Only people with gates and fences have a legally protected zone of privacy around their homes

agents decided to monitor Juan Pineda-Moreno, an Oregon resident suspected of growing marijuana. Agents sneaked onto his property between 4 and 5 a.m. and, upon finding his Jeep parked in the driveway a few feet from his trailer home, attached a GPS tracking device to the vehicle's underside.

After Pineda-Moreno challenged the DEA's actions and requested that the evidence obtained via GPS be suppressed, a three-judge panel of the Ninth Circuit ruled in January that it was all perfectly legal. Then a larger group of judges on the circuit, who were subsequently asked to reconsider the ruling, decided on Aug. 12 to let

the decision stand. (While his appeal makes its way through the courts, Pineda-Moreno has pleaded guilty conditionally to manufacturing marijuana and conspiracy to manufacture marijuana.)

The judges had a peculiar rationale for why Pineda-Moreno's driveway was not private. Although the courts have long held that people have a reasonable expectation of privacy in their homes and in the curtilage—a fancy legal term for the area right around the home—the Ninth Circuit determined that this particular driveway was open to strangers, such as delivery people and neighborhood children, who could wander across it uninvited.

In a blistering dissent, the Ninth Circuit's chief judge, Alex Kozinski, pointed out that by this logic, only wealthy people who protect their property with electric gates and security booths have a zone of privacy around their homes. People who cannot afford such barriers have to put up with the government sneaking around at night.

Kozinski went on to excoriate the court's second big decision about privacy: that once a GPS device has been planted, the government is free to use it to track people without getting a warrant. Plenty of liberals have objected to this kind of spying. But it is Kozinski, a Reagan appointee and leading conservative, who has done so most passionately, lamenting in his dissent that "1984 may have come a bit later than predicted, but it's here at last."